RECORD AND BRIEFS

No. 16-499

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOSEPH JESNER et al.,

Petitioners,

v.

ARAB BANK, PLC,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICI CURIAE* PROFESSORS OF LEGAL HISTORY WILLIAM R. CASTO, MARTIN S. FLAHERTY, STANLEY N. KATZ, SAMUEL MOYN, AND ANNE-MARIE SLAUGHTER IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Petitioners.[1] *Amici* (listed in Appendix A) are professors of legal history who have an interest in the proper understanding and interpretation of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and of this Court's decisions in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S ___, 133 S. Ct. 1659 (2013), and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Among the *amici* are individuals who filed an *amicus curiae* brief in *Sosa*,[2] the position of which this Court adopted in Part III of its opinion. *See* 542 U.S. at 713-14. Several of the *amici* also filed two *amici curiae* briefs in *Kiobel* concerning the historical context of the ATS.[3]

Despite this Court's decision in *Kiobel*, the Second Circuit has refused to find corporations liable under the ATS. *Amici* respectfully urge this Court to resolve this important issue and bring the Second Circuit in

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[1] Counsel of record of all parties received notice at least ten days prior to the due date of *amici*'s intention to file this brief. The parties have consented to the filing. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

[2] The *amici* who joined the *Sosa* brief are William R. Casto and Anne-Marie Slaughter.

[3] The *amici* who joined *Kiobel* briefs are William R. Casto, Martin S. Flaherty, Stanley N. Katz, Michael Lobban, and Anne-Marie Slaughter.

line with its sister courts in recognizing that corporate liability under the ATS is consistent with the text, history, and purpose of the statute.

SUMMARY OF ARGUMENT

In *Sosa v. Alvarez-Machain*, this Court recognized that the First Congress intended the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, to provide jurisdiction over "private causes of action for certain torts in violation of the law of nations." 542 U.S. 692, 724 (2004).[4] The First Congress understood that it would be the common law of the time that would give "practical effect" to this jurisdictional grant. *Id.* at 719-20.

The Second Circuit's decision to read a corporate exemption into the ATS is both inconsistent with the statute's plain text and contrary to congressional intent. The text creates a broad civil remedy ("all causes") for aliens and excludes no class of defendant from suit. The Founders established this federal forum to discharge the nation's duty to provide a remedy for aliens and to avoid state courts hostile to foreigners.

To give effect to this broad remedial purpose, the First Congress intended that federal courts would first draw the norms governing prohibited conduct from the

[4] This brief is concerned with the original text of the ATS. An Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 77 (1789).

law of nations and, second, look to common law to resolve questions left unanswered by the law of nations. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring). Specifically, this means that the First Congress would have understood that issues such as corporate liability – a form of loss allocation based on agency principles[5] – would be resolved based on common-law principles.

During the Founders' era, those principles did not exempt juridical entities from liability for violations of the law of nations. Cases against entities resembling the modern corporation, such as the British East India Company, show as much. No corporate entities were immune from the familiar principle that principals would be allocated the losses for their agents' torts in violation of the law of nations. The Founders would have been confounded at the idea that incorporation could insulate corporate actors from liability for their agent's wrongful acts.

As modern business corporations proliferated during the nineteenth century, courts applied established agency concepts to allocate loss and damages to the corporation (the principal) for the actions of its employees (the agents). Accordingly, this Court should reject

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[5] Loss allocation is "a deliberate allocation of a risk. The losses caused by the torts of employees . . . are placed upon the employer because, having engaged in an enterprise . . . and sought to profit by it, it is just that he, rather than the innocent injured plaintiff should bear them; and because he is better able to absorb them, and to distribute them. . . ." W. Page Keeton et al., *Prosser & Keeton on Torts* § 69, at 500 (5th ed. 1984).

any ahistorical conclusion that the ATS does not recognize corporate liability.

ARGUMENT

I. THE FIRST CONGRESS PASSED THE ALIEN TORT STATUTE TO ENSURE A FEDERAL REMEDY FOR LAW OF NATIONS VIOLATIONS

The Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, vests federal courts with jurisdiction to provide a tort remedy for violations of the law of nations. The First Congress intended the statute to accomplish several goals, including to forestall the appearance of American complicity in such violations. The First Congress understood that the common law would resolve questions regarding the tort remedy left unanswered by the law of nations. By reading a corporate exemption into the ATS, which was absent from the common law of the time, the Second Circuit ignored both the statute's plain text and congressional intent.

A. The Text of the Alien Tort Statute Does Not Exempt Any Class of Defendant

The best evidence of congressional purpose is the statute's text. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 718 (2004). The ATS identifies the plaintiff ("an alien") but is silent with regard to who may be sued. An Act to Establish the Judicial Courts of the United

States, ch. 20, § 9, 1 Stat. 73, 77 (1789) (hereinafter Judiciary Act). Nothing in the statute's text can be read to limit jurisdiction to suits against natural persons.

The ATS deliberately extended jurisdiction to "all causes" in tort for violations of the law of nations. *Id.* This language evinces congressional intent to provide plaintiffs with broad remedies. To exclude a class of defendant would run counter to this text; a suit against a corporation is undeniably a "cause." *See Warren Mfg. Co. v. Etna Ins. Co.*, 29 F. Cas. 294, 295 (C.C.D. Conn. 1800) (No. 17,206). Had Congress intended to exempt particular defendants from ATS suits, it would have done so explicitly. *See* Judiciary Act, ch. 20, § 11, 1 Stat. at 78-79 (limiting defendants in other contexts). Excluding a class of defendant requires reading words into the text that Congress simply did not enact. No early interpreter did so. *See, e.g.*, 1 Op. Att'y Gen. 57 (1795) (not distinguishing among defendants and noting that ATS plaintiffs could include a "company"). The Second Circuit has no justification for doing so now.

B. The Alien Tort Statute Vests Federal Courts with Jurisdiction to Provide a Meaningful Remedy for Law of Nations Violations

Congress enacted the ATS as part of a broader effort to join the international community by embracing the law of nations. *See Sosa*, 542 U.S. at 714; *see also* Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83

Am. J. Int'l L. 461, 483-84 (1989). The Founders were frustrated by the Articles of Confederation's limited powers to address law of nations violations, and they viewed previous efforts in state courts as ad hoc. *Sosa*, 542 U.S. at 716-17; *see also* William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violations of the Law of Nations*, 18 Conn. L. Rev. 467, 515 (1986).

Congress had the so-called Marbois affair fresh in its memory when enacting the ATS. In 1784, the Chevalier de Longchamps assaulted Mr. Marbois, the French legation Secretary in Philadelphia. "Eventually de Longchamps was brought to trial in state court, with the virtually powerless Congress limited to passing a resolution 'highly approv[ing]' the action." *Id.* at 492 (quoting 27 Journals of the Continental Congress 1774-1789, at 502-04 (G. Hunt ed., 1912)). The Marbois affair showcased the Confederation's impotence and proved to be an international embarrassment. These concerns resonated with the Founders at the 1787 constitutional convention. *Id.* at 493-94.[6]

To remedy such problems, the Constitution federalized control over foreign affairs. *See* 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 583 (James Madison) (J. Elliot

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[6] During the constitutional ratification process, another incident in New York led to a complaint from the Dutch government and reaffirmed the necessity of a federal remedy. Casto, at 494 (discussing how Secretary John Jay could only recommend Congress pass a resolution urging New York to institute judicial proceedings).

ed., 1836) ("We well know, sir, that foreigners cannot get justice done them in these [state] courts. . . ."); Federalist No. 42, at 264 (James Madison) (C. Rossiter ed., 1961).

The Founders created a uniquely American system by distributing enforcement responsibility for international obligations among the three coordinate federal branches. *Cf. Henfield's Case*, 11 F. Cas. 1099, 1117 (C.C.D. Pa. 1793) (Case No. 6,360) (speech of Attorney General Randolph) (approving enforcement of international rights and obligations through myriad domestic legal and political approaches). The nascent United States was free to configure its enforcement mechanisms because international law did not define the domestic means of enforcement for law of nations violations, leaving such questions to the sovereign. *See* 13 Journals of the Continental Congress, 1774-1789, at 283 (W.C. Ford ed., 1909). The Founders thus intended judicial remedies through the ATS to help implement the law of nations. *See* Slaughter, at 478.

C. The Founders Intended the Alien Tort Statute to Draw on Common Law Principles to Give the Statute Practical Effect

The ATS brought "torts in violation of the law of nations . . . within the common law of the time." *Sosa*, 542 U.S. at 714. The Founders knew Blackstone's observation that "[t]he principal offences against the law

of nations, [are] animadverted on as such by the municipal laws of England." William Blackstone, 4 *Commentaries on the Laws of England* *68 (G. Sharswood ed., 1886); *see Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 228 (1796) (Chase, J.) ("The law of nations is part of the municipal law of Great Britain. . . ."); 1 Op. Att'y Gen. 68, *4 (1797) ("The common law has adopted the law of nations in its fullest extent, and made it a part of the law of the land."). To the Founders, animadversion "carried the broader implication of 'turn[ing] the attention officially or judicially, tak[ing] legal cognizance of anything deserving of chastisement or censure; hence, to proceed by way of punishment or censure.'" *Sosa*, 542 U.S. at 723 n.16 (quoting 1 *Oxford English Dictionary* 474 (2d ed. 1989)). The ATS "animadverted" upon the law of nations by giving federal courts cognizance over such violations through a common-law remedy.

The First Congress further intended that the ATS have "practical effect." *Sosa*, 542 U.S. at 719. To fulfill this purpose and to implement the statute's remedial purpose, Congress intended courts to use the common law to resolve ancillary issues. Indeed, because internationally constituted tribunals did not exist when the ATS was adopted, Congress could not have expected international bodies to guide U.S. courts on issues such as corporate liability.

The common law has historically resolved such matters in law of nations cases, providing background principles to give effect when the law of nations was silent on a particular matter. *See* Andre Nollkaemper, *Internationally Wrongful Acts in Domestic Courts*, 101

Am. J. Int'l L. 760, 795 (2007) ("Since international law determines only general principles . . . [it] relies on domestic law to supplement it with necessary detail and to adjust it to the domestic context. . . ."); *The Mary Ford*, 3 U.S. (3 Dall.) 188, 190 (1796).[7] Only in relying on such general principles could courts give practical effect to ATS claims. The Founders would have expected judges to apply contemporary legal principles to provide a remedy for a wrong.

In particular, the Founders understood the common-law principle that a master was responsible for the torts of his agent to apply to law of nations claims. *See* Matthew Bacon, 3 *New Abridgment of the Law* 560-62 (4th ed. 1778) (citing agency liability cases). For example, in *Booth v. L'Esperanza*, Judge Bee applied domestic agency law to enforce a law of nations norm adjudging a prize of war. 3 F. Cas. 885 (D. S.C. 1798) (Case No. 1,647). Judge Bee held that by the law of nations, "the captors acquired such a right [to the vessel] as no neutral nation could impugn, or destroy." *Id.* (quoting *The Mary Ford*, 3 U.S. at 198). Judge Bee, however, applied "the laws of this state," South Carolina, to find that a slave following his master's orders

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[7] In the eighteenth century, customary international law, general principles of international law, and domestic law were not firmly distinct; all were part of the domestic law administered by judges (what *Sosa* called "the common law of the time," 542 U.S. at 714). To determine ancillary issues judges did not always identify the body of law on which they relied because all were viewed as part of this domestic common law. Courts drew on such common-law principles for issues including agency to provide appropriate remedies. *See infra* Part II.

maintained the master's possession of the vessel. *Id.* at 885-86; *see also Bolchos v. Darrel*, 3 F. Cas. 810, 810-11 (D. S.C. 1795) (Case No. 1,607) (discussing domestic common-law doctrine of mortgagor rights in resolving ATS case).

II. JURIDICAL ENTITIES WERE NOT EXEMPT FROM LIABILITY FOR THEIR AGENTS' TORTS IN VIOLATION OF THE LAW OF NATIONS, AS ALLOCATED BY DOMESTIC LAW

The ATS combines international legal norms and common law principles: International law defines the norm controlling the regulated conduct, while common law governs remaining rules related to the tort remedy. *Cf. Sosa*, 542 U.S. at 720-21, 724; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring). Thus, the Founders expected domestic law to fill lacunae, including the question of a proper ATS defendant.

Historically, incorporation unquestionably did not insulate juridical entities from suit for law of nations violations. Although the Founders did not encounter corporations in their precise modern form, they were familiar with holding principals (including juridical entities) liable for their agents' misconduct. No court or corporation presumed that law of nations violations would be treated any differently.

A. Early English Corporations, Including the British East India Company, Were Held Liable for the Torts of Corporate Agents

The English corporation was domestically created and governed by letters patent, government charters granted for enumerated functions. *See Hotchkis v. Royal Bank of Scotland*, (1797) 2 Eng. Rep. 1202, 1203 (H.L.); 6 Bro. P.C. 465, 466. Like modern corporations, early incorporated entities were legal persons governed by domestic law. *See* Pet. of Royal Bank of Scotland (July 18, 1728) at 3 (corporations were "considered as one Person" before the law). As such, the corporations were "capable in law to sue and be sued." *Hotchkis*, 6 Bro. P.C. at 465; *see Cojamaul v. Verelst*, (1774) 2 Eng. Rep. 276, 277 (H.L.); 4 Bro. P.C. 407, 408 (company has powers to "sue and be sued"); *Moodalay v. The East India Company*, (1785) 28 Eng. Rep. 1245, 1246 (Ch.); 1 Bro. C.C. 469, 471 (treating Company as similar to natural persons).[8]

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[8] English procedural hurdles did curtail the number of suits against corporations, but no court suggested that the corporate form shielded companies from suit. A major hurdle was that a corporation itself could not produce its books in court as that would require the swearing of oath as to their authenticity, which the corporation could not do as soulless body aggregate. *See* Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 Colum. L. Rev. 43, 46 (1980). Without the books, it was difficult to know whether the corporation had authorized a given act, and such authorization was a necessary prerequisite to corporate liability under eighteenth-century agency law. *See, e.g., Wych v. Meal*, (1734) 24 Eng. Rep. 1078 (Ch.); 3 P. Wms. 310; *Shelling*, 93 Eng. Rep. at 756. Plaintiffs would get

Furthermore, incorporation did not shield a juridical entity from liability for its agents' actions. In 1666, Thomas Skinner sued the East India Company in London for "robbing him of a ship and goods of great value, . . . assaulting his person to the danger of his life, and several other injuries done to him" by Company agents beyond the realm.[9] *The Case of Thomas Skinner, Merchant v. The East India Company*, (1666) 6 State Trials 710, 711 (H.L.). Skinner's claims partly stemmed from the Company stealing his ship, "a robbery committed *super altum mare*." *Id.* at 719. Taking a ship on the high seas – *super altum mare* – was piracy and therefore a violation of the law of nations. James Kent, 1 *Commentaries on American Law* 171 (1826). The House of Lords feared that failure to remedy acts "odious and punishable by all laws of God and man" would constitute a "failure of justice." *Id.* at 745. Faced with "a poor man oppressed by a rich company," *id.*, the Lords decreed that the "Company should pay unto Thomas Skinner, for his losses and damages sustained, the sum of 5,000*l.*" *Id.* at 724.

The Company's liability turned on the issue of corporate agency. The Company conceded its liability for

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around this hurdle by suing corporate agents, who could swear to the books' authenticity.

[9] Of all eighteenth century business entities, the East India Company "resembled more closely the modern corporation, with limited liability, transferable shares, and trading capital owned in the name of the company." Gerard Carl Henderson, *The Position of Foreign Corporations in American Constitutional Law* 12 (1918).

agents' acts undertaken by its order or with its knowledge:

> [T]he Company are not liable for the debt or action of their factors, *unless done by their order*; and if the Company should be liable to every one's clamours, and pretences for wrongs done, or pretended to be done by their factors (when if any such thing were done the same was not by their *order or knowledge*, nor applicable to their use and account) the same will necessarily impoverish and ruin the Company: And the Company gave no order for the seizure of Thomas Skinner's ship. . . .

Id. at 713 (emphasis added).[10]

Notably, neither party made reference to the law of nations in arguing the issue of corporate agency: The law of nations defined only the norm (against piracy), not who should bear the losses. As with any other cause of action, the Company was responsible for its agents' torts.[11] *See Eachus v. Trs. of the Ill. & Mich. Canal*, 17 Ill. 534, 536 (1856) (*Skinner* held that "the courts could give relief" for actions of Company agents "notwithstanding these [actions] were done beyond the seas").

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[10] The Company contested the jurisdiction of the House of Lords but *never* suggested that its corporate form exempted it from liability. *See* 6 State Trials at 718-19.

[11] The Company also acknowledged liability for agents' torts in other contexts. *See, e.g.*, *Ekins v. The East India Company*, (1718) 1 Eng. Rep. 1011, 1012 (H.L.); 2 Bro. P.C. 382, 383; 1 P. Wms. 395; *Shelling v. Farmer*, (1725) 93 Eng. Rep. 756, 756 (K.B.); 1 Str. 646, 646-47.

The same agency principles applied to the Company's governors. Courts would first determine whether the governor acted within the authority granted to the Company as a juridical entity by letters patent. If the governor's actions were found to be within the letters patent, then the court considered whether the action was within the scope of his agency to the juridical entity.[12] If his actions deviated from the scope of his agency, liability attached to the governor personally, for he had committed a "frolic." But if the governor's actions were within the scope of his agency, the proper defendant could be the corporation. *See Skinner*, 6 State Trials at 713.

Further tort suits nominally against the Company's officers illustrate the Company's ultimate liability. In the 1770s, Armenian merchants sued the Company's Governor of Bengal, Harry Verelst, for "trespass, assault, and false imprisonment" by Company agents. *Rafael v. Verelst*, (1775) 96 Eng. Rep. 579, 579 (K.B.); 2 Black. W. 983, 983 (*Rafael 1*). Liability turned on whether the Nawab of Bengal was acting as a "mere creature" of the Company. *Id.* at 580. Ruling on a special verdict, the court ultimately found the Nawab to be a Company agent and assessed substantial damages against Verelst. *See Rafael v. Verelst*, (1776) 96

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[12] Stewart Kyd, 1 *A Treatise on the Law of Corporations* 261-62 (1793) (corporation may authorize specific acts by deed); *id.* at 314 ("It seems that the acts of the regular servants of a corporation, done in their official character, shall in general bind the corporation."); *see also Horn v. Ivy*, (1669) 86 Eng. Rep. 33, 33-34 (K.B.); 1 Ventr. 47, 47-48 (corporation may authorize acts beyond letters patent through general agency).

Eng. Rep. 621, 622-23 (K.B.); 2 Black. W. 1055, 1058-59 (*Rafael 2*).[13]

In consultation with Verelst, Company advisors strategically protected Company assets, deciding it was "prudent" for Verelst to "support the Prosecutions in his own name." Appendix B (Board of Directors determining jury would grant smaller damages "against an Individual, than against a Company as a collective body"). Although seeking to minimize liability, the Company still acknowledged that Verelst had acted within his "Duty" to the Company.[14] *Cf.* Appendix C (Company Committee for Law Suits discussing case against Company and Sir Thomas Chamber and deciding Chamber should "give in his answere [sic] Before the Company . . . as may be most secure and Advantageous to the Company").

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[13] *See Rafael 1*, *supra*, at 581 (opinion of DeGrey, C.J.) (Unlike other judges in initial case, "I consider him [the Nawab] but as an agent, or instrument in the hands of the defendant."); *Rafael 2*, *supra*, at 623 (opinion of Blackstone, J.) ("The Nabob is a mere machine, – an instrument and engine of the defendant.").

[14] The Company decided that Verelst "should be supported by the Company and indemnified from the Damages and Costs given against him." Appendix D. Accordingly, Verelst "readily undertook the defence of the Suit under a full confidence" of the Company's "firm support & assistance *considering the Cause the Companys* & not his own." Appendix B (emphasis added).

B. Courts Allocated Losses to Ships as Juridical Entities for Law of Nations Violations

Through domestic *in rem* jurisdiction, American courts enforced claims against ships for violations of the law of nations.[15] *See, e.g., The Malek Adhel*, 43 U.S. (2 How.) 210, 233-34 (1844); *The Mariana Flora*, 24 U.S. (11 Wheat.) 1, 40-41 (1826) ("piratical aggression by an armed vessel . . . [which] may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations."). In so doing, domestic courts allocated losses among those involved in the shipping enterprise – ship owners, the captain, the crew, or the vessel itself. *See The Malek Adhel*, 43 U.S. at 234; *The Mary Ford*, 3 U.S. at 190 (opinion of Lowel, J.). As Chief Justice Marshall explained, the juridical entity of the ship itself bore liability:

> [I]t is a proceeding against the vessel, for an offence committed by the vessel. . . . It is true, that inanimate matter can commit no offense. The mere wood, iron, and sails of the ship, cannot, of themselves, violate the law. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master.

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[15] *See, e.g., The Resolution*, 2 U.S. (2 Dall.) 1, 3-5 (Fed. App. Pa. 1781) (domestic courts are proper venues for assessing validity of captures); *The Lively*, 15 F. Cas. 631, 632-34 (C.C.D. Mass. 1812) (Case No. 8,403) (domestic courts determine questions of capture and damages).

The Little Charles, 26 F. Cas. 979, 982 (C.C.D. Va. 1818) (Case No. 15,612); *see The Malek Adhel*, 43 U.S. at 234; *see also The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827) ("The thing is here primarily considered the offender, or rather the offence is attached primarily to the thing."); *Talbot v. Commanders & Owners of Three Brigs*, 1 U.S. (1 Dall.) 95, 99 (High Ct. Err. & App. Pa. 1784).

The rationale for subjecting ships to suit follows the fundamental purposes of tort law: To ensure an effective remedy and deter wrongful acts committed as part of the enterprise. *See, e.g., The Malek Adhel*, 43 U.S. at 233-34 ("[T]he vessel . . . is treated as the offender, . . . as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party.").

The ship was but one component of a broader enterprise resembling a modern corporation, with limited liability for owners. The underlying presumption was that both ship owners and ships could be sued, with losses allocated within the enterprise. *See, e.g., Dean v. Angus*, 7 F. Cas. 294, 296 (Adm. Pa. 1785) (Case. No. 3,702) (discussing related case where suit was brought "against the brigs . . . and against certain persons . . . as owners and captains of the said brigs"). Indeed, ships frequently were sued for the crew's misconduct. *See The Little Charles*, 26 F. Cas. at 982 (case against ship for crew's actions "does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner"); *The Malek*

Adhel, 43 U.S. at 233 (claim against ship for crew's actions considered "without any regard whatsoever to the personal misconduct or responsibility of the owner thereof").

In these cases, domestic law always determined questions of loss allocations.[16] In *The Mary Ford*, for example, the trial judge stated:

> [F]or a long time, the law of nations has been settled on principles consonant to justice and humanity, in favour of the unfortunate proprietors; and the persons who have found and saved the property, have been compensated by such part thereof, or such pecuniary satisfaction, as the laws of particular States have specially provided, or, in want of such provision, (as the writers on the law of nations agree) by such reward as in the opinion of those who, by the municipal laws of the country, are to judge, is equitable and right. In our country, no special rule being established, this court is to determine what, in such case, is equitable and right.

3 U.S. at 190; *see also The Amiable Nancy*, 16 U.S. 546, 558-59 (1818) (domestic law allocates "responsibility for the conduct of the officers and crew" to owners who

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[16] Domestic law similarly governed all questions aside from the substantive norm, which was often a violation of the law of nations. *See, e.g.*, *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795) (rights of French privateer determined by law of nations; domestic law governs whether captain is properly considered privateer); *The Palmyra*, 25 U.S. at 14-15 (discussing use of domestic *in rem* jurisdiction for forfeiture of suspected pirate vessel).

although "innocent of the demerit of this transaction" are "bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages."). Specifically, courts used domestic agency principles to determine who should bear the losses. *See Three Brigs*, 1 U.S. at 95 (owners held partially liable when their ships wrongfully captured another vessel); *see also Purviance*, 1 U.S. at 180 (allowing some recovery against malfeasant captain involved in same incident as *Three Brigs*).[17] It was thus domestic law that governed the loss allocation, using both agency principles or liability determinations (either to the ship or the corporation).

III. AS THE MODERN CORPORATION EMERGED, COURTS USED THE SAME DOMESTIC COMMON LAW PRINCIPLES TO ALLOCATE LOSSES AGAINST CORPORATIONS FOR THEIR AGENTS' TORTS

When English courts first grappled with the liability of the East India Company, the use of the corporate form to organize a business was rare. Nevertheless, the English courts determined that the Company was liable for its agents' torts, including law of nations violations. In the early nineteenth century, when the

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[17] English courts likewise applied agency principles to shipmasters and owners. *See, e.g.*, *The Vrouw Judith*, (1799) 165 Eng. Rep. 130, 130; 1. C. Rob. 150, 151 ("[T]he act of the master of the vessel binds the owner in respect to the conduct of the ship as much as if it was committed by the owner himself.").

modern corporation proliferated, American courts quickly reached the same conclusion. In particular, courts came to understand that a corporate tort was not a corporate action per se, but a way of allocating damages to the corporation for torts committed by its agents. *See* Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. Rev. 641, 649-51 (1989). Shortly after the adoption of the ATS, corporate liability had already become commonplace based on these domestic agency principles.

A. As Private Business Corporations Emerged in America, Courts Allocated Losses to Corporations for Actions of Corporate Agents

Business corporations were rare when the First Congress adopted the ATS. "The archetypal American corporation of the eighteenth century is the municipality, a public body charged with carrying out public functions." Morton J. Horwitz, *The Transformation of American Law 1780-1860* 112 (1977); *see also* Schwartz, at 648. By 1780, "colonial legislatures had conferred charters on only seven business corporations, and a decade later that number had increased to but forty." Horwitz, *supra*, at 112; *see also* Simeon Eben Baldwin, *History of the Law of Private Corporations in the Colonies and States*, *in* 3 *Select Essays in Anglo-American Legal History* 236, 250 (1909).

Founding-era jurists regarded the corporation "as an artificial and suspicious statutory entity." Schwartz,

at 649. Eighteenth-century American courts sought to cabin corporate power by limiting corporate rights and duties to those enumerated in their charters.[18] As American corporations proliferated and pursued more modern functions, domestic common law recognized the changes and adapted.[19] *Id.* at 650. American courts quickly applied principles such as agency and loss allocation that had previously resulted in liability against analogous entities. In particular, courts held that the profit-making engaged in by the modern entities could give rise to torts committed by company agents. In this sense, these entities resembled the English chartered corporations. *See supra* Section II.A. Likewise, as corporations became increasingly important to trade and commerce, courts applied loss allocation principles against the enterprise to provide a meaningful remedy to injured parties.

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[18] Many eighteenth-century jurists believed a corporation could only authorize conduct permitted by its charter. Since a corporation's charter would not authorize tortious conduct, torts were frolics, and the remedy lay against the "tortious employee." Schwartz, at 649. Blackstone's statement that a corporation could not "sue and be sued" for "personal injuries" exemplified this instrumentalized conception of the corporation, typified by narrowly chartered public corporations. William Blackstone, 1 *Commentaries on the Laws of England* *475-76 [1753] (G. Sharswood ed., 1893). Corporate tort liability existed of course. *See supra* Section II. This liability derived from Blackstone's agency and contract principles, not from Blackstone's primitive conception of corporations.

[19] The Founders knew the evolution of common-law tort principles and expected the law to develop over time, including in the context of entity liability and loss allocation.

By the early nineteenth century, the evolution in American treatment of corporations was complete. Courts had severed corporate liability from earlier formalistic preconditions, and dismissed the fiction that all torts were frolics. *See Riddle v. Proprietors of Merrimack River Locks & Canals*, 7 Mass. (7 Tyng) 169, 178, 185 (1810) (corporation may be liable for damages or amercement as "some actions of trespass might, at common law, be maintained against aggregate corporations"); *Chestnut Hill & Springhouse Tpk. Co. v. Rutter*, 4 Serg. & Rawle 6, 12-13 (1818) (stating master-servant relationship may create corporate liability). Courts recognized that losses for torts attributable to the corporation should be allocated against the corporation's funds, which distinguished the modern business corporation from its historical predecessor (which often lacked such funds). *See, e.g., Adams v. Wiscasset Bank*, 1 Me. 361, 364 (1821) (losses assessed against bank's corporate fund); *Smith v. Bank of Washington*, 5 Serg. & Rawle 318, 319-20 (1819) (corporate form means bank's "responsibility is limited to its own funds"); *Riddle*, 7 Mass. at 187-88.

B. Corporate Liability Is Not a Norm of Conduct but a Method of Allocating Losses to Corporate Principals for Agents' Torts

Concomitant with the establishment of the modern business corporation, courts began regularly assessing damages against corporations for employees'

torts. *See Chestnut Hill*, 4 Serg. & Rawle at 12. Corporate liability was not considered conduct, but rather a means of allocating losses to corporate principals for agents' torts. *Prosser & Keeton* § 69, at 500 ("The losses caused by the torts of employees, which . . . are sure to occur in the conduct of the employer's enterprise, are placed upon the enterprise itself, as a required cost of doing business."); *see* Young B. Smith, *Frolic and Detour IV*, 23 Colum. L. Rev. 716, 718 (1923); *cf.* Thomas M. Cooley, *A Treatise on the Law of Torts, or the Wrongs which Arise* 67-68 (John Lewis ed., 1907) (rule "well settled" that corporations are liable for agents' torts).

The 1818 *Chestnut Hill* case explicitly rejected the idea that corporations were somehow uniquely exempt from liability for their agents' torts. 4 Serg. & Rawle at 6. Instead, the court considered it axiomatic that the corporation was liable for its servants' trespass because "[t]he rule between corporations and their servants, is substantially the same," as between natural persons and their servants. *Id.* at 11; *see* Joseph K. Angell & Samuel Ames, *Treatise on the Law of Private Corporations Aggregate* § 328 (4th ed. 1840); *cf. Bank of Columbia v. Patterson's Adm'r*, 11 U.S. 299, 305 (1813) ("acts" of corporate agent "within the scope of his authority, would be binding on the corporation").

Courts did not limit tort liability to acts authorized by the corporation's charter because a "master is responsible for the [illegal] acts of the servant, not because he has given him an authority to do an illegal act, but from the relation subsisting between them."

Chestnut Hill, 4 Serg. & Rawle at 12; *see, e.g.*, *Townsend v. Susquehanna Tpk. Rd. Co.*, 6 Johns. 90, 90 (N.Y. Sup. Ct. 1810) (corporation liable for servant's negligence); *Wilson v. Rockland Mfg. Co.*, 2 Del. 67, 67 (Del. Super. Ct. 1836) (same); *Moore v. Fitchburg R.R. Corp.*, 70 Mass. (4 Gray) 465, 465 (1855) (same); James Grant, *A Practical Treatise on the Law of Corporations in General* 278 (1850); Francis Hilliard, 2 *The Law of Torts or Private Wrongs* 474-75 (1859).

Chestnut Hill also exemplifies loss allocation principle. The court decried the "mischievous" consequences of demanding plaintiffs seek remedy from "laborers who have no property to answer the damages." 4 Serg. & Rawle at 17; *see also* Schwartz, *supra*, at 650 (*Chestnut Hill* part of movement to "modernize the rules of corporate liability" and to allocate losses to corporate principals). Like their precursor juridical entities, modern corporations thus became liable for their agents' torts without regard to the source of the substantive norm of conduct. And, as in the eighteenth century equivalent cases, nineteenth century corporate tort liability did not exclude liability for agents' torts in violation of the law of nations.

CONCLUSION

History – in both American and English courts – indicates that courts can render tort judgments against corporations for violations of the law of nations, using domestic law to allocate losses for injuries

committed by corporate agents. Incorporation has never shielded juridical entities from liability. *Amici* thus respectfully urge this Court to grant Petitioners' writ of certiorari to overturn the Second Circuit's ruling to the contrary.

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APPENDIX A

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APPENDIX B

DELIBERATIONS OF BRITISH EAST INDIA COMPANY COMMITTEE OF CORRESPONDENCE (N.D. CA. 1776)

These Deliberations relate to the British East India Company's litigation strategy in *Rafael v. Verelst*. The Deliberations are found in Correspondence with the Court of Directors and related papers on lawsuits brought by William Bolt's Armenian agents, Harry Verelst Papers, Eur 218/69, India Office Records, British Library, London, UK. The Committee of Correspondence was the Company's chief operating committee and consisted of the Chairman, Deputy Chairman, and senior directors of the Court (i.e., Board) of Directors. Anthony Farrington, *Guide to the records of the India Office Military Department*, IOR L/MIL & L/WS 1 (1982). The Deliberations follow:

> Mr. Verelst finding the Armenians had Petitioned the Court of Drs and threatened Prosecutions. Mr. V- in person applied to the Directors but more particularly to the Committee of Correspondence, & requested their Protection should any Prosecution take place against him. Prosecutions were immediately commenced, and on the repetition of Mr. Verelst request, the Committee of Correspondence consisting of [names not inserted]
>
> consulted with Mr. Sayre their Council [sic], as the measures most prudent to be pursued the result of this advice was that Mr. V- should support the Prosecutions in his own name; for

this reason that should Damages be given by a Jury, they would be to a less amount against an Individual, than against a Company as a collective body. Mr. V- therefore readily undertook the defence of the Suit under a full confidence from the whole tenor of their conduct & assurances that he should at all times have their firm support & assistance, considering the Cause the Companys & not his own.

APPENDIX C

UPON DEBATE OF THE WHOLE BUSINESS TOUCHING THE BILL OF THE SONS OF GREENHILL AGAINST THE COMPANYE & SIR THOMAS CHAMBER, ATT A COMITTEE FOR LAW SUITES 23 JUNE 1668

This document is from the East India Company: Minutes of the Court of Directors and Court of Proprietors 1599-1858, IOR/B/29, India Office Records, British Library, London, UK. The Committee on Law Suits was one of a number of committees established by the Court of Directors of the East India Company to manage the detailed business of the Court. *See* Martin Moir, *A General Guide to the India Office Records* (1988).

Att a Comittee for Law Suites 23 June 1668
Present
Governor: John Jollife Esq.
Sr Andrew Riccard
Nicholas Morrice Esq.

Upon Debate of the whole Business touching the Bill of the Sons of Greenhill against the Company & Sir Thomas Chamber. & Mr. Moses was Directed Seriously to consider and advise there-upon, and whether Best for Sir Thomas Chamber to give in his answere Before the Company or after, or that they put in their answeres joyntly togather, and to proceed upon the whole as may be most secure and Advantageous to the Company.

The Committee were of opinion that Sir Thomas Chamber doe put in his answer first.

APPENDIX D

PAPERS OF HARRY VERELST, EAST INDIA COMPANY SERVANT, BENGAL; GOVERNOR OF BENGAL 1767-69

These documents are found in Correspondence with the Court of Directors and related papers on lawsuits brought by William Bolt's Armenian agents, Harry Verelst Papers, Eur 218/69 ff. 98a-100a, India Office Records, British Library, London, UK.

[Page 1]

To the Honble [sic] the Court of Directors for the Affairs of the United Company of Merchants

of England trading to the East Indies.

The Memorial of Harry Verelst Esq. late President and Governor of Fort William in Benga[l]

Gentlemen

By the Report of the Committee of Correspondence and Law Suits of the 12th June 1776 on the several Memorials presented to you praying an Indemnification against the Armenian Suits – it appears the Committee were of Opinion that I should be supported by the Company and indemnified from the Damages and Costs given against me in the Actions and also the Costs of defending the same.

The said Report, with the Commees [sic] Recommendation, was afterwards laid before the Court of Proprietors who were pleased to order the Damages and Costs recovered by the Armenians to be paid and they were paid accordingly.

That your Memorialist has been greatly harafsed and vexed with the said Suits for upwards of seven years and been put to great Costs and Expenses in defending the same to the amount of [not inserted.]

That in regard it appeared to the Committee on a

[Page 2]

full Investigation of the facts and Circumstances of the Case respecting the Armenians that your Memorialis[t] had been actuated by a Sense of Duty to the Company on his Station of President and Governor of Fort William and not from any private or Interested Motives – He therefore humbly hopes you wil[l] not permit him to suffer in his private fortune but think it also reasonable to indemnify him against the Expenses incurred in defending the said Suits.